

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Development of Nationwide Broadband Data to  
Evaluate Reasonable and Timely Deployment of  
Advanced Services to All Americans,  
Improvement of Wireless Broadband  
Subscribership Data, and Development of Data on  
Interconnected Voice over Internet Protocol  
(VoIP) Subscribership

WC Docket No. 07-38

International Comparison and Survey  
Requirements in the Broadband Data Improvement  
Act

GN Docket No. 09-47

A National Broadband Plan for Our Future

GN Docket No. 09-51

**REPLY COMMENTS OF THE MASSACHUSETTS DEPARTMENT OF  
TELECOMMUNICATIONS AND CABLE**

Commonwealth of Massachusetts  
Department of Telecommunications and Cable

Geoffrey G. Why, Commissioner

Two South Station, 4<sup>th</sup> Floor  
Boston, MA 02110  
(617) 305-3580

Dated: August 4, 2009

## I. INTRODUCTION

The Massachusetts Department of Telecommunications and Cable (“MDTC”)<sup>1</sup> respectfully submits these reply comments pursuant to the Public Notice issued by the Federal Communications Commission (“Commission”) on July 17, 2009, in the above-captioned dockets.<sup>2</sup> In this Public Notice, the Commission seeks comment on how to interpret and implement Sections 106(h)(1) and 106(h)(2) of the Broadband Data Improvement Act (“BDIA”).<sup>3</sup> Specifically, the Commission seeks comment on: (1) how to interpret the term “aggregate” in Section 106(h)(1);<sup>4</sup> and (2) whether Section 106(h)(2) is self-effectuating or whether the Commission needs to take any measures to ensure eligible entities’ compliance with

---

<sup>1</sup> The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts (“Commonwealth”). See Massachusetts General Laws (“M.G.L.”) c. 25C, §1.

<sup>2</sup> *Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act*, Public Notice, DA 09-1550, July 17, 2009, 74 Fed. Reg. 36446 (July 23, 2009) (“Public Notice”).

<sup>3</sup> Broadband Data Improvement Act of 2008, Pub.L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-1304).

<sup>4</sup> Public Notice at 2. Section 106(h)(1) of the BDIA requires the Commission to “provide eligible entities access ... to aggregate data collected by the Commission based on the Form 477 submissions of broadband service providers.” 47 U.S.C. § 1304(h)(1). Section 106(i)(2) of the BDIA defines “eligible entity” as:

(A) an entity that is either (i) an agency or instrumentality of a State, or a municipality or other subdivision (or agency or instrumentality of a municipality or other subdivision) of a State; (ii) a nonprofit organization that is described in [S]ection 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under [S]ection 501(a) of such Code; or (iii) an independent agency or commission in which an office of a State is a member on behalf of the State; and (B) is the single eligible entity in the State that has been designated by the State to receive a grant under this Section.

47 U.S.C. § 1304(i)(2). In Massachusetts, the Governor has designated the Massachusetts Broadband Institute (“MBI”) as the state’s “eligible entity.” See Letter from Governor Deval Patrick to Larry Strickling, Assistant Secretary and Administrator of the National Telecommunications and Information Administration (“NTIA”) (dated July 30, 2009).

the confidentiality provisions of Section 106(h)(2).<sup>5</sup> In this reply, the MDTC responds to the Commission’s inquiries as well as to certain commenters who have addressed these inquiries.

## **II. DISCUSSION**

### **A. Interpretation and Implementation of the Term “Aggregate”**

Section 106(h)(1) of the BDIA specifies that “the Commission shall provide eligible entities access ... to aggregate data collected by the Commission based on the Form 477 submissions of broadband service providers.”<sup>6</sup> In its Public Notice, the Commission inquires whether Section 106(h)(1) requires the Commission to provide to eligible entities data that is more aggregated than the data submitted by Form 477 filers and whether the confidentiality provisions of Section 106(h)(2) indicate that the Commission should provide access to data that is more disaggregated than the Form 477 data made available to the public.<sup>7</sup> In addition, the Commission inquires as to the level of aggregation of data that it provides to eligible entities and the factors it should consider when determining that level.<sup>8</sup>

Most comments to these Commission inquiries assert one of two interpretations: either (1) BDIA interpretation requires that all filed Form 477 broadband service provider raw data should be made available to eligible entities for their respective states;<sup>9</sup> or (2) BDIA

---

<sup>5</sup> Public Notice at 2. Section 106(h)(2) of the BDIA requires eligible entities to treat “any matter that is a trade secret, commercial or financial information, or privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider and the eligible entity.” 47 U.S.C. § 1304(h)(2).

<sup>6</sup> 47 U.S.C. § 1304(h)(1).

<sup>7</sup> Public Notice at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *See, e.g.*, Comments of Public Knowledge, Media Access Project, and the New America Foundation (“Public Knowledge, et al. Joint Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 3-4 (filed July 30, 2009) (arguing that Form 477 data is already “aggregate data” under Section 106(h)(1)); Benton Foundation

interpretation requires that the Commission aggregate the Form 477 data released to eligible entities to a greater degree than what is required to be filed.<sup>10</sup> The former interpretation is a much more reasonable one and should be adopted by the Commission.

---

Comments, WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 4-5 (filed July 30, 2009) (asserting that the Form 477 information is already “aggregate data” as required by Section 106(h)(1)); Erratum Comments of the National Association of Regulatory Utility Commissioners (“NARUC Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 6 (filed July 31, 2009) (stressing that “[i]t seems obvious that whatever data the [Commission] finds necessary and useful to collect, their fellow regulators at the State level, looking to accomplish the exact same goals, will also”); Joint Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel (“NASUCA and NJ DRC Joint Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 5 (filed July 30, 2009) (asserting that “aggregate” connotes “all levels of aggregation that the [Commission] compiles, ranging from the “raw” data as filed in the Form 477 up to and including all levels of aggregation that the [Commission] undertakes in its analysis and reporting of broadband data”); Joint Comments of the District of Columbia Public Service Commission and the New Jersey Board of Public Utilities (“DC PSC and NJ BPU Joint Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 3-4 (filed July 30, 2009) (specifying that “a greater level of disaggregation is clearly contemplated by the BDIA” and that “aggregated” data means “that the Commission will provide the “totality” of the data given in each of the Form 477s filed, individually by carrier, by census block, by technology category ... and by upload/download information transfer rate”); Comments of the California Public Utilities Commission and the People of the State of California (“California Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 4 (filed July 30, 2009) (arguing that “aggregate” should be interpreted “narrowly to mean by state ... the [Commission] should provide to each eligible entity in every state the raw data it receives on Forms 477 from all broadband providers operating within the entity’s particular state”).

<sup>10</sup> See e.g., AT&T Comments, WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 3 (filed July 30, 2009) (specifying that “aggregate data” means “the accumulation and organization of data from multiple providers such that no provider-specific information is disclosed”); Comments of Verizon and Verizon Wireless (“Verizon Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 5 (filed July 30, 2009) (asserting that “[t]he BDIA specifies that 477 data may be shared only in aggregate, rather than raw, form”); Comments of the National Cable & Telecommunications Association (“NCTA Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 2 (filed July 30, 2009) (stating that Congressional intent is “reflected in the reference to aggregate data” and the Commission “should gather the data it collects from providers on Form 477, remove the identities of the providers, and provide that information to state mapping entities on a census tract or statewide basis depending on the particular data involved”); XO Communications Comments, WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 3 (filed July 30, 2009) (recommending that the Commission “aggregate the Form 477 data ... in each census tract area after removing any references to specific providers”); Comments of Texas Statewide Telephone Cooperative (“TSTCI Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 3 (filed July 30, 2009) (stating that “aggregate data should be interpreted as collecting information at a census tract or higher level from individual broadband providers ... and providing only consolidated or summary information to eligible entities in such a way that does not disclose the deployment strategies of individual broadband providers”).

The MDTC agrees with certain comments that a reading of the BDIA as a whole requires a very narrow interpretation of Section 102(h)(1).<sup>11</sup> When it enacted the BDIA, Congress made certain findings. In part, Congress found that:

Improving Federal data on the deployment and adoption of broadband service will assist in the development of broadband technology across all regions of the Nation.

The Federal Government should also recognize and encourage complementary State efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services and information technology for the residents and businesses of the Nation.<sup>12</sup>

As a part of its effort to “encourage complementary State efforts,” Congress established the State broadband data and development grant program.<sup>13</sup> The BDIA requires that eligible entities utilize the grant funds, in part, to create for their respective states:

a geographic inventory map of broadband service, *including the data rate benchmarks for broadband service utilized by the Commission* to reflect different speed tiers, which shall (A) identify gaps in such service through a method of geographic information system mapping of service availability based on the geographic boundaries of where service is available or unavailable among residential or business customers; and (B) provide a baseline assessment of statewide broadband deployment in terms of households with high-speed availability.<sup>14</sup>

In order for eligible entities to create these state geographic inventory maps under the grant program, Congress directs the Commission to provide the eligible entities with access to aggregate data.<sup>15</sup> Clearly, when the BDIA is read as a whole, Congress contemplated that the

---

<sup>11</sup> California Comments at 4-6; NARUC Comments at 5.

<sup>12</sup> BDIA Sections 102(1) and (2); 47 U.S.C. §§ 1301(1) and (2).

<sup>13</sup> BDIA Section 106; 47 U.S.C. § 1304.

<sup>14</sup> BDIA Section 106(e)(10); 47 U.S.C. § 1304(e)(10) (emphasis added).

<sup>15</sup> BDIA Section 106(h); 47 U.S.C. § 1304(h).

Commission would provide to eligible entities, and the eligible entities would utilize, the raw 477 data from their respective states as, initially, a prospective starting point for acquiring more detailed data and formulating data maps at a more granular level and, subsequently, as a verification source for any additional broadband data gathered by the eligible entities (i.e., “based on geographic boundaries” with a “baseline assessment ... in terms of households”).<sup>16</sup>

This interpretation is further bolstered by the mapping requirements established by the NTIA in its State Broadband Data and Development Grant Program Notice of Funds Availability (“Broadband Data NOFA”).<sup>17</sup> The NTIA’s Broadband Data NOFA implements certain directives instituted by Congress not only in the BDIA, but also in the American Recovery and Reinvestment Act (“Recovery Act”).<sup>18</sup> Specifically, as the DC PSC and the NJ BPU recognized, the “NTIA, *in consultation with the [Commission]*, found that broadband data should be collected and displayed at the “address level” by each [grant] awardee under the broadband mapping program. *That is, data should be collected at the highest level of granularity, individual households.*”<sup>19</sup> Furthermore, the NTIA required that updated broadband data filings

---

<sup>16</sup> Certain commenters erroneously interpret Section 106(h)(1) to mean that the Commission shall provide eligible entities with Form 477 data that is further aggregated than what is filed. *See e.g.*, Joint Comments of the Independent Telephone & Telecommunications Alliance and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“ITTA and OPASTCO Joint Comments”), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 7 (filed July 30, 2009) (asserting that “the statute informs the Commission that it is to provide aggregate information that is based upon ... Form 477 data, but which is not the Form 477 data itself”). This interpretation is problematic because it does not align with the Congressional mandates established in the BDIA and Recovery Act, discussed above.

<sup>17</sup> *See* Department of Commerce, *State Broadband Data and Development Grant Program Notice of Funds Availability*, 74 Fed. Reg. 32545 (July 8, 2009).

<sup>18</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

<sup>19</sup> DC PSC and NJ BPU Joint Comments at 4 (emphasis added).

by eligible entity awardees should coincide with the Commission's Form 477 data collections.<sup>20</sup>

In other words, NTIA's requirements, based on Congressional directives and "consultation with the Commission," anticipate a much more granular level of broadband data collection by eligible entities than what can be garnered from Form 477 raw data filings. If the Commission further aggregated Form 477 data before releasing the information to eligible entities, then it would be inconsistent with the Congressional broadband data collection mandates. As certain comments point out, the Form 477 data is "most useful" when it is "aggregated only by state,"<sup>21</sup> further "[a]ggregated Form 477 data will have limited value,"<sup>22</sup> and, for some states, having access to the full Form 477 data for a state "will be essential to the states' ability to make [the claim that they can obtain the information required under the NTIA's Broadband Data NOFA]."<sup>23</sup>

The MDTC supports the general assertion that the Form 477 submissions of broadband service providers are already "aggregate data" as required by Section 106(h)(1) of the BDIA.<sup>24</sup> Specifically, the Commission currently requires that Form 477 filers (wireline, terrestrial fixed wireless, and satellite providers): (1) file a separate form for each state in which they provide

---

<sup>20</sup> Broadband Data NOFA at Part VII.A.4.

<sup>21</sup> California Comments at 6.

<sup>22</sup> Comments of the Public Service Commission of the State of Missouri ("MO PSC Comments"), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 3 (filed July 30, 2009).

<sup>23</sup> Comments of the Nebraska Public Service Commission ("NE PSC Comments"), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 2 (filed July 30, 2009).

<sup>24</sup> See, e.g., Comments of Public Knowledge, Media Access Project, and the New America Foundation ("Public Knowledge et. al. Joint Comments"), WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 3-4 (filed July 30, 2009) (arguing that Form 477 data is already "aggregate data" under Section 106(h)(1)); Benton Foundation Comments, WC Docket No. 07-38 and GN Docket Nos. 09-47 and 09-51, at 4-5 (filed July 30, 2009) (asserting that the Form 477 information is already "aggregate data" as required by Section 106(h)(1)).

service;<sup>25</sup> and (2) provide broadband data at the Census Tract level, as opposed to Census Block Group or address levels.<sup>26</sup> First, because a Form 477 is filed for each state in which a broadband service provider provides service, then a reasonable interpretation, as espoused by most state commenters,<sup>27</sup> is that “aggregate” Form 477 data is the data filed for specific states and which is required to be provided by the Commission to eligible entities for their specific states pursuant to Section (h)(1). Second, Census Tract level data is aggregate data relative to the more granular Census Block and address-level demarcations, especially for rural areas.<sup>28</sup> In addition, Census Tract level data does not necessarily align with governmental boundaries,<sup>29</sup> and the reported availability of broadband service in a Census Tract (or any larger unit of measurement) can be misleading as to the extent of actual broadband service availability.<sup>30</sup>

## **B. Confidentiality Provisions**

Section 106(h)(2) of the BDIA specifies that “[n]otwithstanding any provision of Federal or State law to the contrary, an eligible entity shall treat any matter that is a trade secret, commercial or financial information, or privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider and

---

<sup>25</sup> 47 C.F.R. §§ 1.7001(b) and 43.11(a).

<sup>26</sup> *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (“VoIP”) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89, at ¶¶ 2, 10-15 (rel. June 12, 2008) (“*2008 Data Gathering Order*”).

<sup>27</sup> *Supra* note 9.

<sup>28</sup> The MDTC reaffirms its position that Census Tract level data provides insufficient detail for broadband deployment purposes. *See, e.g.*, MDTC and MBI Joint Comments, *In the Matter of a National Broadband Plan for Our Future*, GN Docket No. 09-51, at 8-10 (filed June 8, 2009).

<sup>29</sup> *2008 Data Gathering Order* at n.36.

<sup>30</sup> California Comments at 11.



the eligible entity.”<sup>31</sup> In its Public Notice, the Commission seeks comment on this statutory provision.<sup>32</sup> In particular, the Commission inquires as to whether this section is self-effectuating or whether it needs to take additional safeguards to ensure compliance with this section.<sup>33</sup>

The MDTC concurs with those comments that Section 106(h)(2) of the BDIA is likely self-effectuating for eligible entities that are instrumentalities of their respective states, though implementation of certain confidentiality safeguards would be reasonable.<sup>34</sup> The MDTC agrees with recommendations that the Commission permit state-instrumentality eligible entities to certify that their respective states’ public records law provide Form 477 filers with sufficient protection.<sup>35</sup> However, for those states that do not have sufficient confidentiality provisions, or if the Commission determines that additional safeguards are necessary, then the MDTC supports recommendations that the Commission implement Data Sharing Arrangements with eligible entities under the BDIA similar to those that it currently has with certain state commissions,<sup>36</sup>

---

<sup>31</sup> 47 U.S.C. §1304(h)(2).

<sup>32</sup> Public Notice at 2.

<sup>33</sup> Public Notice at 2.

<sup>34</sup> *See e.g.*, DC PSC and NJ BPU Joint Comments at 5-8; California Comments at 8-9; NARUC Erratum Comments at 5-11.

<sup>35</sup> NARUC Erratum Comments at 5; DC PSC and NJ BPU Joint Comments at 5.

<sup>36</sup> NARUC Erratum Comments at 9-11; DC PSC and NJ BPU Joint Comments at 6-8. Both of these commenters point to the Commission’s past support of data sharing in 2000 and 2004:

[B]ecause we wish to maximize the value of this information collection for states, we conclude that the Chief of the [Wireline Competition] Bureau may release the information collected under this program to the state commissions, subject to certain conditions. A state commission may view all data submitted on a carrier specific basis, by entities filing data for that commission’s state, provided that the state has appropriate protections in place (which may include confidentiality agreements or designation of information as proprietary under state law) that would preclude disclosure of any confidential information. However, where state laws afford less protection than federal [Freedom of Information Act] laws, the higher federal standard will prevail. We are aware that there are two states that have “open records” statutes that may prevent the state from providing confidential protection for sensitive provider information. In these situations, we will

including with the MDTC. As certain commenters point out, “[s]haring this data with State public utility commissions, in addition to eligible entities, will smooth the path to greater broadband usage in all areas of a State.”<sup>37</sup>

**C. The MDTC Supports NARUC’s *Resolution Supporting Access to Broadband Mapping Data*.**

On July 22, 2009, NARUC Board of Directors adopted its *Resolution Supporting Access to Broadband Mapping Data* (“Resolution”).<sup>38</sup> In this Resolution, NARUC requested that the Commission, pursuant to the requirements of the BDIA:

(1) provide States that so request with disaggregated data from the relevant current Form 477 submissions by wireline and wireless broadband service providers; (2) require broadband service providers to simultaneously file future Form 477 reports with both the Commission and the requesting States; and (3) condition the aforementioned on a State’s commitment to treat such Form 477 reports as privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider.<sup>39</sup>

Like other commenters, the MDTC agrees with NARUC’s Resolution.<sup>40</sup>

---

work with these state commissions to enable them to obtain access to such information in a manner that addresses the state’s need for this information and also protects the confidential nature of the provider’s sensitive information. We anticipate that these actions will give state commissions a valuable and unique view into the state of local competition and broadband deployment in their states. In addition, we hope that this will further our goal of reducing the overall reporting burdens placed on entities in these markets by minimizing the need for additional information collection programs at the state level.

NARUC Erratum Comments at 10-11 and DC PSC and NJ BPU Joint Comments at 7, citing *In the Matter of Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, FCC 00-114, at ¶ 95 (rel. March 30, 2000). See also *In the Matter of Local Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, FCC 04-266, at ¶ 26 (rel. Nov. 12, 2004) (deciding to retain the policies and procedures with regard to data-sharing arrangements).

<sup>37</sup> NARUC Erratum Comments at 11; DC PSC and NJ BPU Joint Comments at 8.

<sup>38</sup> NARUC Erratum Comments Appendix A.

<sup>39</sup> NARUC Erratum Comments Appendix A.

<sup>40</sup> See, e.g., NE PSC Comments at 3; MO PSC Comments at 5; NASUCA and NJ DRC Joint Comments at 8.

### **III. CONCLUSION**

In summation, the MDTC offers to the Commission the following recommendations: (1) Form 477 data does not need to be further aggregated; (2) eligible entities should be provided all Form 477 broadband service provider raw data for their respective states; (3) though Section 106(h)(2) appears to be self-effectuating, subjecting eligible entities to certain confidentiality requirements is reasonable; and (4) the Commission should adopt NARUC's Resolution recommendations.

Respectfully submitted,

Commonwealth of Massachusetts  
Department of Telecommunications and Cable

By:

/s/  
Geoffrey G. Why, Commissioner